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CRIMINAL LAW ISSUES

U.S. v. KNIGHTS, No. _____, ____ U.S. ____, S.Ct. ____, ____ U.S.L.W. _____ (Dec. 10, 2001).

Chief Justice REHNQUIST delivered the opinion of the Court.

A California court sentenced respondent Mark James Knights to summary probation for a drug offense. The probation order included the following condition: that Knights would "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Knights signed the probation order, which stated immediately above his signature that "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." App. 49. In this case, we decide whether a search pursuant to this probation condition, and supported by reasonable suspicion, satisfied the Fourth Amendment.

. . . .

Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more. The search condition provides that Knights will submit to a search "by any probation officer or law enforcement officer" and does not mention anything about purpose. App. 49. The question then is whether the Fourth Amendment limits searches pursuant to this probation condition to those with a "probationary" purpose.

Knights argues that this limitation follows from our decision in Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Brief for Respondent 14. In Griffin, we upheld a search of a probationer conducted pursuant to a Wisconsin regulation permitting "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband," 483 U.S., at 870, 871, 107 S.Ct. 3164. The Wisconsin regulation that authorized the search was not an express condition of Griffin's probation; in fact, the regulation was not even promulgated at the time of Griffin's sentence. [Footnote omitted.] The regulation applied to all Wisconsin probationers, with no need for a judge to make an individualized determination that the probationer's conviction justified the need for warrantless searches. We held that a State's operation of its probation system presented a "special need" for the "exercise of supervision to assure that [probation] restrictions are in fact observed." . . . .

In Knights's view, apparently shared by the Court of Appeals, a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in Griffin--i.e., a "special needs" search conducted by a probation officer monitoring whether

the probationer is complying with probation restrictions. This dubious logic--that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it--runs contrary to Griffin 's express statement that its "special needs" holding made it "unnecessary to consider whether" warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.

. . . .

We need not decide whether Knights's acceptance of the search condition constituted consent in the Schneckloth sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances," Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), with the probation search condition being a salient circumstance.

. . . .

The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights's acceptance of the search provision. It was reasonable to conclude that the search condition would further the two primary goals of probation--rehabilitation and protecting society from future criminal violations. The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights's reasonable expectation of privacy.[6] We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. See United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (individualized suspicion deals "with probabilities"). Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. See, e.g., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

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[6] We do not decide whether the probation condition so diminished, or completely eliminated, Knights's reasonable expectation of privacy (or constituted consent, see supra, at 6) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

EDWARDS v. STATE, No. 09S02-0112-CR-649, ___ N.E.2d ___ (Ind. Dec. 18, 2001).
BOEHM, J.

We hold that routine, warrantless strip searches of misdemeanor arrestees, even when incident to lawful arrests, are impermissible under the Indiana Constitution and the United States Constitution, and that before jail officials may conduct warrantless strip searches of misdemeanor arrestees detained awaiting the posting of bond, those officials must have a reasonable suspicion that the arrestee is concealing weapons or contraband.

. . . .

In this case, Edwards was strip-searched when he was processed into the Cass County jail several hours after his arrest. At that point Edwards had not been charged with any criminal activity, and the possible charges he faced were all for nonviolent misdemeanor

offenses. We do not believe that routine, warrantless strip searches of misdemeanor arrestees, even when incident to lawful arrests, are reasonable as both Article I, Section 11 of our state constitution and the Fourth Amendment to the federal constitution require. There may be misdemeanor charges for which a body search is appropriate because of the reasonable likelihood of discovery of evidence, but false informing, without more, is certainly not such a crime. Nor, as explained below, does the possible discovery of weapons or contraband justify a search of every incarcerated person. For these reasons, we grant transfer to make clear we do not agree with the Court of Appeals to the extent it implied that as a general proposition a routine, warrantless strip search incident to a lawful misdemeanor arrest is reasonable.

. . . To the extent a search is conducted on the basis of jail security, the indignity and personal invasion necessarily accompanying a strip search is simply not reasonable without the reasonable suspicion that weapons or contraband may be introduced into the jail. The dissenting opinion from the Court of Appeals would require that the reasonable suspicion be connected to the offense for which the individual was arrested. Edwards v. State, 750 N.E.2d 377, 383 (Ind. Ct. App. 2001). We do not believe the suspicion need be based on that offense. Some offenses inherently give rise to a reasonable suspicion that a suspect possesses weapons or contraband. But irrespective of the offense, the circumstances surrounding the arrest, rather than the offense itself, may give rise to a reasonable suspicion, and if so the search is justified.

. . . .

Here, it is clear that Denny was present when contraband was discovered on Edwards' cohort, Walker. However, the scant record before this Court includes no testimony from Denny or other jail personnel, and it is not clear whether Denny entertained a reasonable suspicion that a strip search of Edwards would reveal more contraband, or whether he was merely following a routine that dictated an improper, warrantless strip search of every misdemeanor arrestee. Because the State did not carry its burden of proving that the warrantless strip search of Edwards fell within an exception to the warrant requirement, Edwards' motion to suppress should have been granted.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

MARSHALL v. STATE, No. 25A03-0105-CR-139, ___ N.E.2d ___ (Ind. Ct. App. Dec. 13, 2001).

VAIDIK, J.

Laymon R. Marshall filed this interlocutory appeal to challenge the denial of his motion for discharge under Indiana Criminal Rule 4(C). He contends that the trial court erred in denying his motion because his trial was scheduled for 49 days beyond the one-year limit of Criminal Rule 4(C). Because we find that the trial court erroneously denied Marshall's motion, we reverse.

. . .The State charged Marshall with Child Molesting, a Class C felony [footnote omitted] on March 7, 2000. [Footnote omitted.] At the initial hearing, the court ordered the State to provide discovery to Marshall within 30 days. Two days later, Marshall filed another motion for discovery requesting the "opportunity to sample or test any blood, hair, semen, other physical exidence [sic] taken by search warrant or otherwise." [Citation to Brief omitted.] Marshall moved for an immediate hearing on discovery issues that the trial court denied as being premature. Marshall renewed his motion for discovery on March 28, 2000. On April 27, 2000, Marshall filed a Request for Early Release of Information Concerning DNA. Specifically, Marshall requested 32 items involving the DNA evidence.

The trial court set the case for pre-trial conference on August 16, 2000, and for trial to begin on August 30, 2000. On August 2, 2000, [footnote omitted] Marshall filed a Motion for Continuation of Trial. In part, the motion stated that "[i]t is not now possible for the

Defendant to investigate and properly prepare for the trial . . . . Such preparation would include DNA testing and further examination of physical evidence by the Defendant." [Citation to Brief omitted.] The trial court granted the motion and set the case for trial on October 5, 2000.

On September 12, 2000, the trial court's chronological case summary (CCS) states that the parties appeared and "[t]rial now continued to commence at 8:30 a.m. on 11-21-00 in order for State to provide discovery in regards to DNA testing performed by the State." [Citation to Brief omitted.]

On November 15, 2000, the State filed a Motion to Continue because:

> [T]he defendant has requested detailed information concerning the process and procedures for the State's DNA analysis of critical physical evidence in this cause and the State has been unable to comply with that request in a timely manner.

[Citation to Brief omitted.] The trial court granted the motion and set the case for trial to begin on March 7, 2001, and final pretrial on February 22, 2001. The pretrial conference was not held on February 22, 2001. Instead, the prosecutor and defense attorney met informally. The prosecutor told the defense attorney that the March 7, 2001 trial would not occur. The defense attorney thought that the trial was not going to proceed due to the State's failure to provide discovery.

The next CCS entry, which is dated April 9, 2001, states:

> This entry is made to reflect that prior to the March 7, 2001 trial date the State requested resetting of this cause due to congestion of the calendar and availability of the courtroom caused by the change in the Superior Court judge, the former deputy Prosecutor, and the consequent shifting of cases to the Circuit Court Judge. The motion was granted due to said congestion and final pretrial conference is set for April 11, 2001 at 1:15 p.m. and trial by jury to commence at 9:00 a.m. on April 25, 2001.

[Citation to Brief omitted.] Marshall's attorney received a copy of the proposed minute entry in the prosecutor's handwriting on April 10, 2001.

On April 11, 2001, Marshall filed a Motion for Discharge because April 25, 2001, is 49 days beyond the one-year limit provided for under Criminal Rule 4(C). The trial court denied his motion. This appeal followed.

. . . .

. . . We find that none of the delay in bringing Marshall to trial was chargeable to him for purposes of Criminal Rule 4(C).

. . . .

Regarding the continuation of the August 30 trial date, we agree with Marshall. Generally, a defendant is responsible for any delay caused by his action including seeking or acquiescing in any continuance. [Citation omitted.] However, a defendant cannot be charged with the delay if the defendant made his motion because the State failed to comply with a discovery request. *Harrington v. State*, 588 N.E.2d 509, 511 (Ind. Ct. App. 1992) (citing *Biggs v. State*, 546 N.E.2d 1271, 1274 (Ind. Ct. App. 1989)). In this instance, Marshall filed his motion for a continuance on August 2, 2000, because he could not prepare for trial without the DNA evidence from the State. The trial court granted this request and reset the trial to October 5. Thus, the State's failure to respond to his discovery request caused this delay and as such, Marshall is not accountable for the delay of the August 30, 2000 trial date.

Nevertheless, the State asserts that Marshall should be assigned this delay because the State did not have the information Marshall requested, Marshall's access to the

information was equal to that of the State, and Marshall requested the continuance in order to perform his own analysis of the evidence. We cannot agree with the State. To support the proposition that the State could not turn over materials it did not possess, the State relies on *Denney v. State*, 695 N.E.2d 90 (Ind. 1998). In *Denney*, sixteen days after the defendant killed a man, a blood sample was taken from the defendant. At the time of trial, the State had not received the results of the blood test. The State received the results four days after the defendant's trial. On appeal, Denney contended that the results of the blood test were newly discovered evidence entitling him to a new trial. . . . In particular, the court noted that Denney knew all along that the State had drawn his blood for testing, but had not pursued the results. Denney did not seek to perform his own analysis of the blood, did not request that the results be expedited, and did not move for a continuance based on the lack of the results. The present case is distinguishable from *Denney*. Marshall sought to perform his own analysis of the State's DNA evidence. He also moved for early release of the DNA evidence and a continuance because he had not received the test results. Thus, Marshall actively pursued the evidence and the holding in *Denney* is not controlling in this case.

The State also relies on *Potts v. Williams*, 746 N.E.2d 1000, 1003 (Ind. Ct. App. 2001) for the proposition that Marshall is not entitled to DNA evidence because he has equal or better access to the evidence than the State. *Potts* was a medical malpractice case. Dr. Potts hired Dr. Nocon as his expert witness. Williams planned to cross-examine Dr. Nocon using depositions and trial transcripts from other cases with injuries similar to Williams where Dr. Nocon had also been a witness. Potts moved to compel Williams to provide copies of the materials. The trial court denied the motion and Potts appealed. On appeal, we held that the trial court properly denied the motion because Potts was in an equal if not better position to obtain these materials than Williams. Specifically, we concluded that the copies of depositions and trial transcripts of Dr. Nocon's previous testimony were Williams' work-product and therefore, not discoverable. In the present case, by contrast, Marshall sought evidence that was not created by his own expert. Marshall was at the mercy of the State to provide him with the DNA evidence. Thus, *Potts* is distinguishable and is not persuasive authority for this case.

Essentially, the State invites us to examine this continuance in isolation, without considering the events that follow. This we cannot do. The CCS entries as well as the pleadings of the State and Marshall made after the continuance of the August 30, 2000 trial date consistently attribute the subsequent delays to the State's failure to provide discovery. The court's CCS entry of September 12, 2000 is particularly convincing. It continues the October 5, 2000 trial date to November 21, 2000, so that the State may provide the DNA discovery results to Marshall. Based on the repeated continuances made in order that the State could provide Marshall with discovery, Marshall was being asked to either waive his rights to a speedy trial or proceed to trial unprepared. This is a decision a defendant should not be forced to make. [Citation omitted.] . . .

. . . .

Finally, Marshall argues that the delay from March 7, 2001 to April 25, 2001, should not be charged to him. In particular, Marshall asserts that the prosecution failed to give him the ten days notice required under Criminal Rule 4 that the March 7, 2001 trial date was continued due to a congested court calendar. On April 10, 2001, Marshall's attorney received notice that a pretrial conference was scheduled for the following day and that the trial was scheduled for two weeks later. The notice was a proposed minute entry file stamped April 9, 2001. It was in the prosecutor's handwriting and initialed by the trial court judge. The proposed entry stated that it was made in response to the State's request before March 7, 2001, that the trial be rescheduled because of court congestion. In particular, the State claimed that there was congestion because of the election of a new judge. The trial court granted the motion and set the trial for April 25, 2001.

Criminal Rule 4(A) provides that:

> [W]here there was not sufficient time to try him during such period because of congestion of the court calendar . . . the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor.

Here, the prosecutor failed to file a motion for continuance due to congestion of the court calendar ten days prior to the date set for trial, March 7, 2001. Because the prosecutor failed to follow the clear mandates of Criminal Rule 4(A), the delay from March 7 to April 25 cannot be attributed to Marshall. In addition, no showing was made that the delay in filing was not the fault of the prosecutor. Thus, the resulting delay is not chargeable to the defendant.

. . . .

DARDEN and MATHIAS, JJ., concurred.

MEEKS v. STATE, No. 39A05-0106-CR-262, ___ N.E.2d ___ (Ind. Ct. App. Dec. 13, 2001).

BAKER, J.

The facts most favorable to the verdict are that on April 5, 2000, Madison City Police Officer Kenneth L. Jones was notified by police dispatch that it had received an anonymous tip that Meeks, a habitual traffic offender, was driving to the Quality Farm and Fleet store. Officer Jones located Meeks's vehicle at that store and arrested Meeks after he drove his vehicle out of the store's parking lot.

On April 6, 2000, Meeks was charged with operating a vehicle after suspension of driving privileges for life, [footnote omitted] a class C felony. During the trial on May 1, 2001, the State established that in 1993 Meeks was convicted for being a habitual traffic violator and was suspended from driving for life. Officer Jones testified that he stopped Meeks on the basis of the tip that he was driving on a suspended driving license, and that Meeks was not speeding, operating while intoxicated, or operating his vehicle recklessly at the time of his arrest.

Meeks did not dispute that his license had been suspended or that he was driving unlawfully. Rather, he testified that he drove to the feed supply store to purchase food and bedding for his hatchling geese, ducks, and chickens, and that the young birds might have perished without these supplies. Meeks argued that, given the facts of his case, the jury should be instructed that it "could refuse to enforce the law's harshness when justice so requires." [Citation to Brief omitted.] Specifically, Meeks tendered the following jury instruction regarding nullification:

> Since this is a criminal case, the Constitution of the State of Indiana makes you the judges of both the law and facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, amend, alter, disregard, abolish or ignore the law. The instructions of this court are the best source as to the law applicable in this case.
>
> Our state constitution also intentionally allows you latitude to refuse to enforce the law's harshness when justice so requires. This should not be taken lightly nor exercised whimsically, but only exercised upon a sincere and solemn belief that justice of this case requires its application.

[Citation to Brief omitted]. The trial court instructed the jury on the first paragraph, but not the second paragraph, of Meeks's tendered jury instruction. Subsequently, the jury found Meeks guilty as charged. In determining Meeks's sentence, the trial court considered the

mitigating factors that he had led a law-abiding life for almost eight years, that his purpose for violating the law was benign, that Meeks was a kind and generous person who meant no harm by his actions, and that his actions had neither caused nor threatened harm. [Citation to Brief omitted.] The trial court then sentenced Meeks to the minimum sentence of two years imprisonment. [Footnote omitted.] . . .

. . . Meeks claims that current precedent, which indicates that the jury does not have the power of nullification, is inconsistent with the language and intent of Article I, Section 19 of the Indiana Constitution. Meeks asserts that this constitutional provision should be interpreted to allow the jury to refuse to enforce the law's harshness when justice so requires, as suggested by Justice Rucker in his law review article, The Right To Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation, 33 Val. U. L. Rev. 449, 481 (1999). Thus, Meeks invites this court to overrule the precedent set by our supreme court and hold that his proposed instruction was a correct statement of the law and should have been read to the jury.

. . . .

[I]t is well established that the portion of Meeks's instruction actually given by the trial court properly states the law.

Moreover, our supreme court has rejected an instruction similar to the second portion of Meek's proposed instruction—that the jury has the right to mitigate its verdict if it feels that the mandatory punishment is harsh considering the circumstances of the case. Specifically, in Walker v. State, 445 N.E.2d 571, 574 (Ind. 1983), the defendant proposed the following instruction:

> If, after considering all of the evidence presented in this case, you find that the mandatory punishment inflicted on the Defendant under the Habitual Offender Statute is excessive under the standards read to you, then you may take that finding into consideration in rendering your verdict.

[Citation omitted.] According to our supreme court, "the refused instruction[] would have conveyed to the jury the belief that it had a power of nullification, which clearly it does not possess under the law." [Citation omitted.] The court then went on to approve an instruction almost identical to the one given by the trial court in this case. [Footnote omitted.] [Citation omitted.]

. . . .

. . . In his article, Justice Rucker examines the historical circumstances that gave rise to the concept of jury nullification articulated in Article I, Section 19. He traces the common law principle of jury nullification to its English roots in Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670)—the post-medieval trial of William Penn and William Meade. [Footnote omitted.] [Citation omitted.] The jury in Bushell's Case refused to convict Penn and Meade for unlawful assembly after they delivered speeches at a Quaker meeting in London, England. [Footnote omitted.] [Citation omitted.] Even after the court ordered that the jury be deprived of food, water, and heat until it returned a guilty verdict, the jury held out and refused to return the verdict requested by the court. [Citation omitted.] As a result, the court fined and imprisoned the jurors until, on a writ of habeas corpus, the justices abolished the practice of punishing juries for their verdicts. [Citation omitted.]

The principle of Bushell's Case—the jury's right to protect citizens from oppressive government—was observed in colonial and post-revolution America.The principle of Bushell's Case—the jury's right to protect citizens from oppressive government—was observed in colonial and post-revolution America. The principle of Bushell's Case—the jury's right to protect citizens from oppressive government—was observed in colonial and post-revolution America. [Footnote omitted.] [Citation omitted.] According to Justice Rucker, in drafting Article I, Section 19 of our State constitution, the framers intended to preserve this right of ordinary citizens to check and control the power of the government. [Citation omitted.] Justice Rucker states:

> Certainly the jury's right to determine the law meant something to the framers. If it did not mean that the jury could alter, abolish, or amend the law, and if it did not mean that the jury could set aside the law on the basis of having a differing opinion of what the law was, then what did it mean? Considering the apparent purpose for which the provision was adopted, as informed by the history of Indiana's constitutional scheme, one may reasonably conclude that it means the jury has a right not to apply the law when their conscience so dictates.

[Citation omitted.] . . .

It is apparent from the proliferation of case law on the subject of jury nullification, that our supreme court has engaged in an extensive and in-depth analysis of this issue. The court has carefully scrutinized the text, intent, and historical underpinnings of Article I, Section 19, and, since it decided Fleenor [v. State, 514 N.E.2d 80 (Ind. 1987)] in 1987, has adhered to the principle that the constitutional right of the jury to determine the law in criminal cases does not include the right to disregard or ignore the law as it exists. See Canaan v. State, 541 N.E.2d 894, 910 (Ind. 1989); Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994). While this court is permitted to criticize supreme court precedent, we are constrained not to offer such criticism where, as here, there has been recent and repeated articulation of the same principle. Accordingly, we decline Meeks's invitation to criticize our supreme court's ruling on jury nullification and hold that the trial court properly instructed the jury regarding its rights and obligations under the Indiana Constitution. Thus, we conclude that the trial court did not err in refusing to give Meeks's tendered instruction on jury nullification.

. . . .

BAILEY and NAJAM, JJ., concurred.

TURNEY v. STATE, No. 27A02-0010-CR-644, ___ N.E.2d ___ (Ind. Ct. App. Dec. 13, 2001).

KIRSCH, J.

On appeal, Turney raises seven issues, one of which we find dispositive:

> In an action for sexual misconduct with a minor, evidence of child sexual abuse accommodation syndrome was introduced. Did the prosecution violate the due process rights of the defendant as set out in *Brady v. Maryland* [footnote omitted] by withholding evidence of prior sexual misconduct by the minor.
>
> We reverse and remand for a new trial.

. . . .

After trial, Turney discovered that the State had not disclosed to him that one year prior to the incident here at issue A.D.H. had engaged in sexual activity with two boys, whom he believes are the natural children of her foster parents. [Footnote omitted.] Following discovery of the information, Turney's appellate counsel contacted the Grant County Prosecuting Attorney's Office and, in response, received a letter dated October 2, 2000, a portion of which follows:

> With regard to your question about the victim being accused of sexually molesting two boys, it did come to our attention prior to Mr. Turney's trial that during the winter and spring of 1998, when the victim was fourteen and fifteen years of age, she did participate in sexual activity with two under age boys, fifteen and twelve years of age. As you noted we did not disclose this information to defense counsel. We were under no obligation to do so.

[Citation to Brief omitted.] Turney argues that suppression of this evidence violated his right to due process and that his convictions must therefore be vacated. He specifically maintains that the State portrayed A.D.H. as an innocent victim and bolstered her credibility by introducing evidence of her emotional state after the incident and by introducing child sexual abuse accommodation syndrome evidence. Turney maintains that the State's

purposeful failure to disclose this information to him prior to trial was compounded by the admission of child sexual abuse accommodation syndrome evidence. We agree.

. . . .

At oral argument, the State conceded that the evidence was favorable to Turney based upon its impeaching value and that the State willfully suppressed the evidence; however, the State maintains that no reversible error occurred because the evidence was not material.

Turney argues that the evidence was indeed material. He contends that the State suppressed evidence that the victim "had herself sexually molested two young boys" who were the natural children of her foster parents. [Citation to Brief omitted.] He argues, "In realty, [sic] the complaining witness herself was a child molester." [Citation to Brief omitted.] Turney claims the evidence was material because throughout the trial A.D.H. was portrayed as an innocent victim who was emotionally upset following the incidents and who was removed from her foster family because she had smoked cigarettes with the foster parents' children. He reasons that her own acts as a child molester provided an alternative explanation for her emotional upset and being removed from the foster family and that he was unable to elicit this during cross-examination of the State's witnesses. As a result, he claims this left the jury to infer that he was the cause of the victim's behavioral problems.

The State responds that even if the information had been disclosed to Turney, it would have been inadmissible pursuant to Ind. Evidence Rule 412(a), which provides that:

> In a prosecution for a sex crime, evidence of the past sexual conduct of the victim or witness may not be admitted, except:
> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
> (4) evidence of conviction for a crime to impeach under Rule 609.

According to the State, because evidence of the victim's prior sexual conduct fails to meet any of these exceptions, the evidence would have been inadmissible in any event. Citing *Steward v. State*, 636 N.E.2d 1439 (Ind. Ct. App. 1994), *aff'd* 652 N.E.2d 490 (Ind. 1995), Turney counters that Evid. R. 412 must yield when a defendant is denied his Sixth Amendment right to cross-examine witnesses.

In *Steward*, as in the present case, the State presented expert testimony that the victim exhibited behavioral problems consistent with those experienced by victims of sexual abuse. At trial, Steward was not allowed to present exculpatory evidence that in addition to accusing him of the molestation, the victim had also accused other individuals of molesting her. . . . Consistent with this rule, we observed and discussed the risk of "partial corroboration." [Citation omitted.]

> In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." This bolstering evidence invites the inference that because the victim was accurate in stating that sexual contact occurred, the victim must be accurate in stating that the defendant was the perpetrator. Therefore, in such cases, the defendant must be allowed to rebut this inference by adducing evidence that another person was the perpetrator.
> In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue. . . . [W]e emphasize that both the necessity for and the constitutional right to such cross-examination are limited to these specific and narrow circumstances

> and clearly do not permit a general inquiry into the victim's sexual past or allow the defendant to posit hypothetical perpetrators, an inquiry which would violate the Rape Shield Statute.

[Citation omitted.] . . . We reasoned that using the Rape Shield Statute [footnote omitted] to exclude evidence establishing "another possible source" of the victim's behavioral problems impeded a defendant's ability to rebut inferences that the jury was allowed to draw from the expert testimony concerning child sexual abuse accommodation syndrome:

> In other words, the State was allowed to take advantage of the inculpatory conclusion, but Steward was prohibited from placing the exculpatory conclusion before the jury. . . .

[Citation omitted.]

Here, despite the State's argument on appeal, it nevertheless offered evidence at trial that A.D.H.'s behavior and emotional upset were consistent with a child who had been sexually abused. . . .

Further, the State's theory at trial was that A.D.H. was an innocent victim and sexually pure. As in *Steward*, the State bolstered its theory with expert testimony concerning child sexual abuse accommodation syndrome, thereby opening the door to the introduction of evidence by Turney of A.D.H.'s prior sexual conduct, which would have provided another possible explanation for her behavior.

The State attempts to distinguish the present case from *Steward* by contending that no evidence was presented that A.D.H. accused another adult of molesting her. Recently, in *Davis v. State*, 749 N.E.2d 552, 555-56 (Ind. Ct. App. 2001), *trans. denied*, we reaffirmed the principles announced in *Steward* by holding that exclusion of a victim's prior sexual conduct unfairly bolstered the victim's trial testimony. In *Davis*, evidence was presented that a medical examination following the molestation revealed that the victim had been sexually active prior to the incident. In response, Davis attempted to introduce evidence establishing that the victim had been sexually active with individuals other than him. Relying on the Rape Shield law, the trial court refused to allow Davis to introduce the evidence. On appeal, we reversed Davis's child molesting convictions and noted:

> [W]hile L.P. accused Davis of having sex with her, the jury was precluded from hearing that L.P. was having sex with others at age twelve. Such exclusion unfairly bolstered her testimony, inasmuch as the inference arises that, because L.P. was accurate in stating that sexual contact had occurred, as disclosed by the physical examination, she also must have been accurate in stating that Davis was the perpetrator of the charged offenses. This is the type of erroneous inference we sought to prevent from occurring under our holding in *Steward*. *We therefore reject the State's argument that this case differs from the circumstances that were presented in Steward. In this case, as well as in Steward, it was apparent that there could have been another possible source for the acts of molestation*.

[Citation omitted.]

Under our holdings in *Steward* and *Davis*, Turney was entitled to impeach the child sexual accommodation syndrome evidence through cross-examination which could have established another possible source for A.D.H.'s emotional upset. Accordingly, given the circumstances of the present case, Evid. R. 412 would similarly not bar evidence of A.D.H.'s prior sexual conduct while in foster care.

Additionally, we conclude that based upon the theory that the State advanced at trial, the prior acts of A.D.H. were material. Because the evidence concerned A.D.H.'s credibility as a witness, had the State disclosed the evidence it may not have offered evidence concerning A.D.H.'s emotional state or child abuse sexual accommodation syndrome evidence.

. . . Under *Brady*, the State has the obligation to make a decision concerning what information to disclose to the accused at the time of the accused's request. However, a prosecutor's decision whether to disclose information is ultimately judged post-trial. . . . In sex-related cases, the State does not have the obligation to disclose the entire sexual history of the victim, but, it does have the duty to disclose evidence favorable to the accused. Therefore, in such cases we will judge whether the prosecution should have disclosed information prior to trial based upon the evidence presented at trial.

Here, the introduction of the child sexual abuse accommodation syndrome evidence made the disclosure mandatory. Therefore, we are compelled to conclude that under the circumstances of this case the State violated *Brady* by failing to disclose the information. As a result, Turney's convictions may not stand. . . .

Because the issue may again arise during retrial of the case, we address the question of the introduction of evidence under Evid. R. 404(b). Prior to trial, Turney filed a Motion in Limine seeking to exclude the testimony of three female students who were expected to testify that Turney had engaged them in conversations of a sexual nature and requested nude photographs from two of the teenagers. The trial court denied the motion.

. . . [O]ver the objection of Turney, the witnesses were permitted to testify. C.D. testified that Turney requested that she wear a mini-skirt to his ISS class so that he could see her "butt." A.C. testified that after Turney asked her to bring him a nude photograph of herself, she felt uncomfortable and was afraid to return to his classroom. She further explained that Turney told her he had other similar pictures. N.O. also testified that Turney asked her for a nude photograph of herself. She further stated that Turney asked her out to dinner and a movie, discussed having a party at his house, and in response to seeing her tongue piercing, commented: "Wow, what what [sic] could be done with that." [Citation to Record omitted.]

. . . .

The State argued at trial that the evidence was relevant and admissible to show Turney's motive, preparation, plan, and intent. Although Turney may have engaged in sexual conversations with other students, this does not necessarily indicate that he had a plan to perform oral sex upon A.D.H. He was not accused of, nor does the record before us indicate that he committed, any sexual acts upon any of the three 404(b) witnesses. Accordingly, the evidence was inadmissible to prove preparation or plan given its minimal probative value. Moreover, because the conversations were not directly tied to his relationship to A.D.H., the evidence was inadmissible to prove motive given its complete lack of probative value. Finally, Turney's intent was not placed in issue so as to justify admission under the intent exception. Under any of these circumstances, we conclude that the probative value of the evidence is outweighed by its prejudicial effect.

Reversed and remanded.

BAILEY, and BROOK, JJ., concurred.

JUVENILE LAW ISSUE

W. R. S. v. STATE, No. 49A02-0106-JV-360, ___ N.E.2d ___ (Ind. Ct. App. Dec. 13, 2001).

VAIDIK, J.

W.R.S. contends that the juvenile court was prohibited from committing him to the D.O.C. because the court had already detained him for 24 days in a juvenile detention facility pending his fact-finding hearing. We agree.

As we mentioned earlier, juveniles who commit status offenses are treated differently for incarceration purposes than juveniles who commit acts that would be crimes if committed by adults. . . . [T]he only status offenders who can be committed to the D.O.C. are repeat runaways who violate the terms of their court-ordered placement or repeat truants who violate the compulsory school attendance law despite a court order to comply with the law. [Citations omitted.]

In this case, the juvenile court committed W.R.S. to the D.O.C. as a repeat truant. A juvenile court may only incarcerate a repeat truant if it follows the procedures for modifying dispositional orders under Indiana Code § 31-37-22-6. According to Indiana Code § 31-37-22-6, a juvenile court can modify a dispositional order and incarcerate a repeat truant if:

> (1) [the] child fails to comply with IC 20-8.1-3 concerning compulsory school attendance as part of a court order with respect to a delinquent act under IC 31-37-2-3 (or IC 31-6-4-1(a)(3) before its repeal);
>
> (2) the child received a written warning of the consequences of a violation of the court order;
>
> (3) the issuance of the warning was reflected in the records of the hearing;
>
> (4) *the child is not held in a juvenile detention facility for more than twenty-four (24) hours, excluding Saturdays, Sundays, and legal holidays, before the hearing at which it is determined that the child violated that part of the order concerning the child's school attendance*; and
>
> (5) the child's mental and physical condition may be endangered if the child is not placed in a secure facility

. . .

Along with establishing the procedure necessary to commit repeat truants to the D.O.C., Indiana Code § 31-37-22-6 also insures that status offenders will not be held in secure facilities unnecessarily. As we concluded in Part I of our opinion, juvenile courts may not detain alleged truants in a secure facility. [Citation omitted.] As a disincentive against ordering pre-hearing detention, Indiana Code § 31-37-22-6 provides that certain dispositional alternatives, such as commitment to the D.O.C., will be lost to the juvenile court if the court detains an alleged repeat truant in a secure facility before a fact-finding hearing for over 24 hours.

. . . .

The juvenile court was not allowed to detain W.R.S. in a secured facility for one minute, let alone 24 days, because W.R.S. was only alleged to have committed the status offense of truancy. Even if W.R.S. had been a runaway, the juvenile court could not have detained him for 24 days in a juvenile detention facility without dispositional alternatives being lost. By detaining W.R.S. in a juvenile detention facility for over 24 hours, the juvenile court lost the ability to modify its dispositional order and commit W.R.S. to the D.O.C. Therefore, we find that the juvenile court erred when it ordered that W.R.S. be committed to the D.O.C. for three months. Thus, we reverse the court's modification of its dispositional order.

. . . .

DARDEN and MATHIAS, JJ., concurred.

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